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No. 02-1609

IN THE

Supreme Court of the United States

THE CITY OF LITTLETON, COLORADO,
Petitioner,

v.

Z.J. GIFTS D-4, L.L.C., A COLORADO LIMITED LIABILITY COMPANY D/B/A CHRISTAL'S,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, AND U.S. CONFERENCE OF MAYORS, JOINED BY THE AMERICAN PLANNING ASSOCIATION, AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

As rephrased by the Court, the question presented is:

Whether the requirement of prompt judicial review imposed by *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215 (1990) entails a prompt judicial determination or a prompt commencement of judicial proceedings.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	6
ARGUMENT	8
THE FIRST AMENDMENT DOES NOT REQUIRE THE PROMPT RESOLUTION OF CHALLENGES TO THE APPLICATION OF A MUNICIPAL ORDINANCE REQUIRING THE LICENSING OF SEXUALLY ORIENTED BUSINESSES	8
A. *FW/PBS* Does Not Require The Prompt Resolution Of Judicial Challenges To License Denials	10
B. First Amendment Principles Establish That Prompt Resolution Of Judicial Challenges To License Denials Is Not Necessary	15
C. Ordinances Requiring The Licensing Of Sexually Oriented Businesses Should Not Be Treated As Prior Restraints	19
CONCLUSION	24

TABLE OF AUTHORITIES

Cases — Page

11126 Baltimore Blvd., Inc. v. *Prince George's County*, 58 F.3d 988 (4th Cir.), cert. denied, 516 U.S. 909 (1995) 8, 12

Baby Tam & Co. v. *City of Las Vegas*, 154 F.2d 1097 (9th Cir. 1998) 8, 12

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963) 10, 15, 16

Blount v. *Rizzi*, 400 U.S. 410 (1971) 10

Boss Capital, Inc. v. *City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999) ..... *passim*

Chesapeake B & M, Inc. v. *Harford County*, 58 F.3d 1005 (4th Cir. 1995) 8

City News & Novelty, Inc. v. *City of Waukesha*, 531 U.S. 278 (2001) 18

City of Colorado Springs v. *2354 Inc.*, 896 P.2d 272 (Colo. 1995) 4

City of Erie v. *Pap's A.M.*, 529 U.S. 277 (2000) ... 2, 8, 22

City of Lakewood v. *Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) 11

City of Littleton v. *Z.J. Gifts*, D-4 LLC, No. 01CA2319 (Colo. Ct. App. Feb. 20, 2003) 4, 6

City of Los Angeles v. *Alameda Books, Inc.*, 535 U.S. 425 (2002) 2, 8, 21-22

City of Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986) ..... *passim*

City of Waukesha v. *City News & Novelty, Inc.*, 604 N.W.2d 870 (Wis. 2000), cert. dismissed, 531 U.S. 278 (2001) 9

East Brooks Books, Inc. v. *City of Memphis*, 48 F.3d 220 (6th Cir.), cert. denied, 516 U.S. 909 (1995) 8, 12

Forsyth County v. *Nationalist Movement*, 505 U.S. 123 (1992) 16

TABLE OF AUTHORITIES—Continued

Page

Freedman v. *Maryland*, 380 U.S. 51 (1965) ..... *passim*

FW/PBS, Inc. v. *City of Dallas*, 493 U.S. 215 (1990) ..... *passim*

Graff v. *City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), cert. denied, 511 U.S. 1085 (1994) 12

Grand Brittain, Inc. v. *City of Amarillo*, 27 F.3d 1068 (5th Cir. 1994) 8, 12, 18

Harkins v. *Greenville County*, 533 S.E.2d 886 (S.C. 2000), cert. denied, 531 U.S. 1125 (2001) 8-9

Heffron v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981) 19, 22

Jews for Jesus, Inc. v. *Massachusetts Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993) 12

Lady J. Lingerie, Inc. v. *City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999) 8

National Socialist Party of America v. *Village of Skokie*, 432 U.S. 43 (1977) 10

Nightclubs, Inc. v. *City of Paducah*, 202 F.3d 884 (6th Cir. 2000) 8, 9, 12, 18

Poulos v. *State of New Hampshire*, 345 U.S. 395 (1953) 13

Shuttlesworth v. *City of Birmingham*, 394 U.S. 147 (1969) 12, 13, 16, 17

Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975) 11, 15, 16

TK's Video, Inc. v. *Denton County*, 24 F.3d 705 (5th Cir. 1994) 8, 12

Teitel Film Corp. v. *Cusack*, 390 U.S. 139 (1968) 10

Thomas v. *Chicago Park Dist.*, 534 U.S. 316 (2002) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Tri-State Generation & Transmission Co. v. *City of Thornton*, 647 P.2d 670 (Colo. 1982)	4
Ward v. *Rock Against Racism*, 491 U.S. 781 (1989)	19, 20
Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976)	2, 8, 9
Statutes, Rules and Ordinances	
Colo. R. Civ. P. 106	5
Colo. R. Civ. P. 106(a)(4)	4
Colo. R. Civ. P. 106(a)(4)(V)	4, 18
Littleton City Code § 3-14-1	21, 22
Littleton City Code § 3-14-2	2, 20, 21
Littleton City Code § 3-14-3(A)	21
Littleton City Code § 3-14-3(B)	3
Littleton City Code § 3-14-3(C)	3
Littleton City Code § 3-14-8(A)	3, 17
Littleton City Code § 3-14-8(A).7	4
Littleton City Code § 3-14-8(B)	3-4, 4
Littleton City Code § 3-14-8(B).3	4
Littleton City Code § 3-14-8(C)	4
Littleton City Code § 3-14-11(A)	3
42 U.S.C. § 1983	4

INTEREST OF THE *AMICI CURIAE*

Amici National League of Cities, International Municipal Lawyers Association, International City/County Management Association, National Conference of State Legislatures, National Association of Counties, and U.S. Conference of Mayors are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in the issue presented in this case: whether a municipal ordinance that requires the licensing of sexually oriented businesses is invalid if it does not assure that judicial challenges to license denials will be adjudicated promptly.[1]

Amicus American Planning Association (APA) is a non-profit public interest and research organization founded in 1978 to advance the art and science of planning—including physical, economic and social planning—at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society. The APA represents more than 30,000 professional planners, commissioners, and citizens involved with urban and rural planning issues.

This case has great practical importance for States and local governments across the Nation. As the Court has noted on a number of occasions, local governments have found the effective regulation of adult businesses to be essential for the prevention of crime, the preservation of property values, and

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

the maintenance of neighborhood quality. See, *e.g.*, *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie* v. *Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). To accomplish these purposes, States and municipalities have adopted licensing regulations similar to the Littleton ordinance challenged in this case.

If respondent prevails in its argument that prompt judicial resolution of challenges to the application of such regulations must be assured—a guarantee that it is beyond the power of local governments to provide—these regulations will be rendered invalid, significantly undercutting the ability of States and local governments to combat the corrosive secondary effects of sexually oriented businesses. Because *amici* have substantial experience with the sort of ordinance at issue here and will be directly affected by the Court's decision, they submit this brief to assist the Court in the resolution of this case.

STATEMENT

1. Like innumerable municipalities across the Nation, the City of Littleton, Colorado ("the City"), has imposed restrictions on the operation of adult businesses.[2] Such establishments may operate only in specified areas of the City: they may not be located within five hundred feet of a

[2] "Adult business" is defined as "[a]n adult arcade, adult bookstore, adult novelty shop, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, sexual encounter establishment or nude model studio." Littleton City Code § 3-14-2. Each of these individual terms is itself further defined by reference to specified sexual activities that take place at a given location or to specified portions of the anatomy that are visible in materials that are shown or displayed there.

The relevant provisions of the Littleton City Code are reproduced in the appendix to petitioner's brief on the merits.

church, school, child-care facility, public park, locally regulated massage parlor, or community correctional facility, and also may not operate within one thousand feet of another adult business or of a state-regulated massage parlor. Littleton City Code §§ 3-14-3(B) & (C). Moreover, they may be located only in districts zoned for industrial uses. See Pet. App. 34, 62.

In addition, and of particular importance here, adult businesses may not operate in Littleton without a license. The City Code specifies the grounds on which a license may be denied: an applicant is disqualified, for example, if it recently has had an adult business license suspended or revoked, has operated an adult business recently determined to be a public nuisance, or has not obtained the required sales tax license. Littleton City Code § 3-14-8(A).[3] The City Code also specifies the procedure for obtaining—and for challenging the denial of—a license. In its current form, the Code provides that the City Clerk must act on an application within 14 days of the date of its submission. *Id.* If the City Clerk denies the application, "he/she shall make written findings of fact stating the reasons for the denial." *Id.*, § 3-14-8(B). The

[3] In all, eight grounds are specified for denial of a license: an application must be rejected if the applicant is underage; if the applicant made a false statement in connection with the application; if the applicant or specified individuals associated with the applicant had an adult business license revoked within the preceding year; if the applicant operated an adult business that has been determined to be a public nuisance within the preceding year; if a corporate parent of the applicant is not authorized to do business in the State; if the applicant is overdue in the payment of city taxes, fees, fines, or penalties imposed in relation to an adult business; if the applicant has not obtained the required sales tax license; and if the applicant has been convicted of a specified criminal act within the preceding five years. Littleton City Code § 3-14-8(A). The City Code also specifies the grounds for revocation of a license, which principally include allowing misconduct of various kinds to take place on the premises. See *id.*, § 3-14-11(A).

applicant may then bring a challenge before the City Manager, who must hold a hearing on the matter within 14 days and must issue a ruling within two days after the hearing is completed, "based on findings of fact."[4] *Id.* The license is deemed approved if any city official or department fails to comply with these deadlines. *Id.*, § 3-14-8(C).

If the license is denied and the denial is sustained by the City Manager, the decision may be appealed to state district court "pursuant to [Colo. R. Civ. P.] 106(a)(4)." *Id.*, § 3-14-8(B).3. This rule authorizes a district court to stay any administrative decision denying a license. See Colo. R. Civ. P. 106(a)(4)(V). It also permits, but does not require, the court to provide expedited review in such cases. See *City of Colorado Springs* v. *2354 Inc.*, 896 P.2d 272, 284 & n.9 (Colo. 1995). In addition, license applicants "may challenge the constitutionality of ordinances as applied in [Colo. R. Civ. P.] 106(a)(4) review proceedings." *Id.* at 283 n.8 (citing *Tri-State Generation & Transmission Co.* v. *City of Thornton*, 647 P.2d 670, 676 n. 7 (Colo. 1982)).

2. In the fall of 1999 respondent Z.J. Gifts D-4, L.L.C., opened an adult business in Littleton's business district, even though respondent had not obtained the required adult business license and previously had been informed by city officials that adult businesses were not permitted at that location.[5] Pet. App. 2. Shortly before opening its business, respondent commenced this suit against the City in federal district court pursuant to 42 U.S.C. § 1983, arguing (among other things) that Littleton's regulations of adult businesses

[4] At the time of the decision below, the City Clerk and City Manager each had 30 days within which to act. See Pet. App. 5-6. An amendment adopted in November 2003 shortened that period.

[5] The City also alleges that respondent does not possess the sales tax license required by city law. See Littleton City Code § 3-14-8(A).7; *City of Littleton* v. *Z.J. Gifts, D-4 LLC*, No. 01CA2319 (Colo. Ct. App. Feb. 20, 2003), slip op. 9.

are inconsistent with the First Amendment because they do not guarantee that a judicial challenge to the denial of a license will be adjudicated promptly. The district court rejected this argument, upholding the constitutionality of the City's adult business licensing ordinance. Pet. App. 40-66.

In relevant part, the Tenth Circuit reversed. Pet. App. 1-39.[6] The court began by stating "that 'licensing of adult entertainment establishments' must be analyzed as a prior restraint." *Id.* at 16 (citation omitted). From that starting point, the court concluded that Littleton's mechanism for the review of license denials does not comport with the requirements set out in *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990). Although the City requires prompt administrative disposition of a license application and allows for an immediate judicial challenge to the denial of a license, the Tenth Circuit held that "mere 'access' to judicial review" to contest such a denial is insufficient and that, instead, "*FW/PBS* requires a prompt final judicial *decision* regarding the validity of the denial." *Id.* at 32 (emphasis in original). Because Colorado Rule of Civil Procedure 106 does not *guarantee* that a court will decide a case challenging a license denial within a set time, the court held the judicial review feature of the Littleton ordinance unconstitutional.

While the federal litigation was continuing, the City did not prevent respondent from operating its business. Instead, prior to the decision of the U.S. district court, the City began an injunctive action against respondent in state court, seeking to require compliance with the City Code. Respondent opposed the City by arguing, among other things, that Littleton's licensing system is inconsistent with the First Amendment.

[6] The Tenth Circuit also addressed a number of other issues that are not now before the Court. It held unconstitutional a City requirement that a letter from a zoning official accompany the application to operate an adult business (Pet. App. 20-24) but upheld the ordinance's location restrictions. *Id.* at 33-38.

See *City of Littleton* v. *Z.J. Gifts, D-4*, slip op. 3. The state trial court ruled for the City, determining that respondent should be enjoined from operating its business in a manner that violates the City's Code. In an opinion issued after the Tenth Circuit rendered the decision under review here, the Colorado Court of Appeals reversed the state trial court, holding that the injunction was too vague to conform to the requirements of Colorado law. *Id.* at 10-12. The court remanded the case for consideration of various state-law issues regarding application of the licensing requirements. See *id.* at 8-10. That suit is now pending in state trial court. At no point has respondent been required to cease operation of its business while awaiting the outcome of judicial proceedings.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision that a scheme for the licensing of adult businesses must guarantee a prompt judicial decision when a business contests the denial of a license is flawed on several levels. *Freedman* v. *Maryland*, 380 U.S. 51 (1965), held that such judicial promptness is required when a State imposes a system of censorship; when applying such a regime, the Court explained, the censor must bear the burden of seeking court approval for the suppression of speech and any restraint imposed in advance of a judicial decision must be temporary. In *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990), however, the lead opinion took a different approach to the judicial review requirement where the licensing of sexually oriented businesses is at issue, appearing to find it constitutionally sufficient that the adult business have an opportunity to *initiate* a court challenge prior to the cancellation of its license. This departure from *Freedman* is only logical. The Court held in *FW/PBS* that the administrators of licensing schemes for adult businesses (unlike the censors in a case like *Freedman)* do *not* bear the burden of seeking court approval for license denials—and it

was the requirement that the censor obtain advance judicial authorization for the suppression of speech that was the essential predicate for *Freedman*'s further insistence on the prompt completion of judicial review.

More fundamental First Amendment principles confirm that prompt *adjudication* of judicial challenges to the denial of licenses for sexually oriented business is not necessary. Such a promptness requirement makes sense when the regulation of speech is presumptively unconstitutional because it involves censorship of content or unconstrained administrative discretion. But regulations of adult businesses like those at issue here do not require an assessment of the content of speech and give local officials very limited discretion. As a consequence, such licensing regimes do not allow for the suppression of particular ideas. At the same time, the proprietors of adult businesses have a substantial economic stake in seeing the judicial review process through to completion, a reality that reduces the need for an immediate judicial resolution. In these circumstances, the availability of a temporary restraining order or preliminary injunction to prevent abusive uses of the licensing process suffices to protect the interest in free expression.

Indeed, we believe that challenges to licensing schemes for sexually oriented businesses do not call for the use of prior restraint analysis *at all*. It is appropriate to treat a regulation of speech as a prior restraint when it may be applied to suppress particular points of view. In contrast, regulations that serve purposes unrelated to the content of expression are deemed content neutral, even if they have an incidental effect on some speakers but not others. That analysis should govern licensing requirements for sexually oriented businesses. The Court has settled that such regulations, which are directed at the secondary, non-expressive effects of adult businesses, are justified without reference to the content of the regulated

speech. That sort of restriction is properly analyzed as a time, place, and manner regulation rather than as a prior restraint. See *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986).

ARGUMENT

THE FIRST AMENDMENT DOES NOT REQUIRE THE PROMPT RESOLUTION OF CHALLENGES TO THE APPLICATION OF A MUNICIPAL ORDINANCE REQUIRING THE LICENSING OF SEXUALLY ORIENTED BUSINESSES

The rule announced by the court below, which precludes the use of municipal licensing requirements for adult businesses unless a prompt judicial resolution of any challenge is guaranteed, is one of enormous practical importance to States and local governments across the Nation. The Court has repeatedly noted the efforts by municipalities to address the problems of crime, declining property values, and other aspects of urban blight that often accompany sexually oriented businesses. See, *e.g.*, *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie* v. *Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). As the substantial volume of litigation raising the issue presented here suggests,[7] many

[7] See, *e.g.*, *11126 Baltimore Blvd., Inc.* v. *Prince George's County*, 58 F.3d 988, 998-1001 (4th Cir.), cert. denied, 516 U.S. 909 (1995); *Chesapeake B & M, Inc.* v. *Harford County*, 58 F.3d 1005 (4th Cir. 1995); *TK's Video, Inc.* v. *Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *Grand Brittain, Inc.* v. *City of Amarillo*, 27 F.3d 1068 (5th Cir. 1994); *Nightclubs, Inc.* v. *City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *East Brooks Books, Inc.* v. *City of Memphis*, 48 F.3d 220, 225 (6th Cir.), cert. denied, 516 U.S. 909 (1995); *Baby Tam & Co.* v. *City of Las Vegas*, 154 F.3d 1097, 1101-1102 (9th Cir. 1998); *Boss Capital, Inc.* v. *City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999); *Lady J. Lingerie, Inc.* v. *City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *Harkins* v. *Greenville County*, 533 S.E.2d 886 (S.C. 2000), cert. denied, 531 U.S. 1125 (2001); *City of Waukesha* v. *City News & Novelty, Inc.*, 604 N.W.2d 870 (Wis. 2000), cert. dismissed, 531 U.S. 278 (2001).

jurisdictions have responded to these problems by enacting licensing schemes very similar to the one employed in Littleton. But although these licensing ordinances provide for judicial review of licensing decisions, they generally do not, and could not, require judicial resolution of challenges to license denials by a date certain. "Quite obviously, a municipality has no authority to control the period of time in which a state court will adjudicate a matter" (*Nightclubs, Inc.* v. *City of Paducah*, 202 F.3d 884, 893 (6th Cir. 2000)), which means that the Tenth Circuit's approach would invalidate "city ordinances on the basis of the swiftness or slowness of that particular state's judicial procedures." *Id.* at 897 (Merritt, J., dissenting).

As a result, the rule contended for by respondent would render unconstitutional a very substantial body of municipal legislation, an outcome that would cause significant disruption across the country. At the same time, local governments would lose the flexibility that the Court has recognized as important in addressing local problems that take widely varying forms. See *Renton*, 475 U.S. at 52; *American Mini Theatres*, 427 U.S. at 71 (plurality opinion). Fortunately, however, that outcome is not required here. The Tenth Circuit's approach is not supported by precedent; cannot be justified by the constitutional principle that underlies the Court's decisions in this area; and is inconsistent with the First Amendment rules governing the regulation of adult businesses generally. The judgment below invalidating the Littleton ordinance accordingly should be reversed.

A. *FW/PBS* Does Not Require The Prompt Resolution Of Judicial Challenges To License Denials

1. A classic prior restraint, in which government officials are given substantial discretion to suppress speech that they dislike, must be subjected to the most rigorous procedural requirements. That is the rule stated in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), where state law empowered officials to prevent the exhibition of films that they did not find to be "moral and proper." *Id.* at 53 n.1. The *Freedman* Court held that, for such a restraint to be valid, (1) "the burden of proving that the film is unprotected expression must rest on the censor"; (2) "the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes affected expression," meaning that the censor either must issue a license "within a specified brief period * * * or go to court to restrain showing the film"; and (3) "the procedure must also assure a prompt and final judicial decision." *Id.* at 58-59. See *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 321 (2002); *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 227 (1990) (opinion of O'Connor, J.). Although the Court's decisions leave some ambiguity about the precise nature of this "prompt" judicial review requirement where censorship schemes like the one considered in *Freedman* are at issue, we recognize that there is some support for the proposition that such schemes will satisfy the constitutional mandate only if they provide for "a final judicial determination on the merits within a specified, brief period." *Blount* v. *Rizzi*, 400 U.S. 410, 417 (1971).[8]

[8] See *National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (State must provide "immediate appellate review"); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, 141, 142 (1968); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 730 (1963) ("an almost immediate judicial determination of the validity of the restraint"). Other decisions, however, have not appeared to contemplate the same immediacy in the judicial review process. See, *e.g.*, *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 771 (1988) (referring to "relatively speedy" judicial review); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 560 (1975) ("a prompt final judicial determination must be assured"). Indeed, *Freedman* itself emphasized that the Court did "not mean to lay down rigid time limits or procedures." 380 U.S. at 61.

The procedures announced by the Court in *Freedman* were devised to address the particular problems posed by a regime that censors speech on the basis of content. As the Court recently explained, it

> recognized in *Freedman* that a scheme conditioning expression on a licensing body's prior approval of content "presents peculiar dangers to constitutionally protected speech." [380 U.S.] at 57. "The censor's business is to censor," *ibid.*, and a licensing body likely will overestimate the dangers of controversial speech * * * ." *Id.* at 52 n.2. Cf. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 561, and n. 11 (1975). In response to these grave "dangers of a censorship system," *Freedman*, 380 U.S. at 58, [the Court] held that a film licensing process must contain certain procedural safeguards in order to avoid constituting an invalid prior restraint[.]

Thomas, 534 U.S. at 321.

In *FW/PBS*, however, the Court appeared to take a very different approach to the judicial review requirement where the licensing of sexually oriented businesses is at issue. Justice O'Connor's lead opinion for three Justices in *FW/PBS* did not indicate that there must be a prompt judicial "determination" or "immediate" judicial review, as *Freedman* and its progeny required. Instead, Justice O'Connor's opinion indicated that the licensing regime must provide only for "the *possibility* of prompt judicial *review*." 493 U.S. at 228 (emphasis added). Justice O'Connor repeated this formulation throughout her opinion. See *id.* at 229 (emphasis

added) (referring to "an *avenue* for prompt judicial review"); *id.* at 230 (emphasis added) (referring to "the *availability* of prompt judicial review"). This approach seems to contemplate a regime in which it is sufficient that the adult business have an opportunity to *initiate* a court challenge prior to the cancellation of its license.[9] As the court below itself recognized (see Pet. App. 25), several lower courts accordingly have read this language to permit—and municipalities have relied upon it in enacting—licensing ordinances that comply with the judicial review requirement by providing nothing more than "*access to the courts* within a brief period." *TK's Video, Inc.* v. *Denton County*, 24 F.3d 705, 709 (5th Cir. 1994) (Higginbotham, J.).[10]

That the lead opinion in *FW/PBS* believed the First Amendment to be satisfied in this setting by timely access to judicial review finds support in the authority cited by Justice O'Connor. In describing the judicial review requirement, Justice O'Connor's opinion pointed not only to *Freedman* and *Skokie*, but also to *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969). There, the Court referred to the

[9] Justice White and Chief Justice Rehnquist were of the view that *Freedman* was *wholly* inapplicable in this setting (493 U.S. at 244 (opinion of White, J.)), as was Justice Scalia under a different rationale. *Id.* at 250 (opinion of Scalia, J.). In contrast, Justice Brennan, writing for three Justices in *FW/PBS*, would have held that *all* of the procedural safeguards identified in *Freedman* must be provided in the adult business context. *Id.* at 239 (Brennan, J., concurring in the judgment). In this setting, the departure from *Freedman* undertaken by Justice O'Connor's opinion commanded majority support in the Court.

[10] Accord *Boss Capital*, 187 F.3d at 1256; *Graff* v. *City of Chicago*, 9 F.3d 1309, 1324 (7th Cir. 1993), cert. denied, 511 U.S. 1085 (1994); *Grand Brittain*, 27 F.3d at 1070; *Jews for Jesus, Inc.* v. *Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). But see *Nightclubs, Inc.*, 202 F.3d at 892; *Baby Tam & Co.*, 154 F.3d at 1101-1102; *11126 Baltimore Blvd.*, 58 F.3d at 998-1001; *East Brooks Books*, 48 F.3d at 225.

"*availability* of expeditious judicial review" (*id.* at 155 n.4 (emphasis added)), illustrating the meaning of that phrase by reference to Justice Harlan's *Shuttlesworth* concurrence and Justice Frankfurter's concurring opinion in *Poulos* v. *State of New Hampshire*, 345 U.S. 395 (1953). Those opinions, in turn, found it sufficient that the applicant for a permit was able to "invoke relief by way of mandamus or certiorari." *Id.* at 420 (Frankfurter, J., concurring in the result). See *Shuttlesworth*, 394 U.S. at 162 n.4 (Harlan, J., concurring) ("Since the time remaining [before a scheduled event for which a license was sought] was sufficient to obtain relief by way of mandamus, there was no need to consider whether the State had a constitutional obligation to provide a more rapid procedure."). These avenues for review do not impose absolute time limits for judicial decision.

2. In addition, the conclusion of a majority of the Justices in *FW/PBS* that the *Freedman* test does not in all respects govern the licensing of adult businesses establishes that the First Amendment does not, in this context, require a fixed date for the resolution of judicial challenges to license requirements. In particular, Justice O'Connor's lead opinion held that, because regulation of the licensing of sexually oriented businesses is not "presumptively invalid" (493 U.S. at 229), *Freedman*'s requirement that *the censor* initiate judicial proceedings is inapplicable in the adult business context.[11] The requirement that the censor go to court, however, was an essential premise for *Freedman*'s further insistence on the prompt completion of judicial review—meaning that the abandonment of the former requirement necessarily affects the application of the judicial review mandate to the licensing of sexually oriented businesses.

[11] As noted above (at note 9, *supra*), three other Justices, who would have gone considerably farther, agreed in *FW/PBS* that this aspect of *Freedman* (among others) is inapplicable in the adult business setting.

The Court explained in *Freedman*:

> While the State may require advance submission of all films, * * * *the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression.* * * * [O]bviously a procedure requiring a judicial determination suffices to impose a valid final restraint. * * * To this end, the exhibitor must be assured * * * that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, *even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the distributor.* * * * *Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.*

Freedman, 380 U.S. at 58 (emphasis added). The Court's holding in *Freedman* thus was that, where censorship schemes are at issue, the decision to prohibit expression may not have final effect absent a judicial decision; that any restraint imposed in advance of such a judicial decision may be only temporary; and that, because speech might be inhibited after the expiration of a temporary administrative restraint during the pendency of the required judicial review, a prompt final judicial decision must be assured "to minimize the deterrent effect of an interim" license denial.

This analysis, however, has no application where the licensing of adult businesses is concerned because in that setting a restraint on speech *may* become final in the absence of a judicial decision; denial of a license *will* be permanent

unless the applicant decides to challenge the restraint in court. As a consequence, the administrative decision to deny a license to a sexually oriented business need *not* be only temporary. And this means that *Freedman*'s rationale for requiring a prompt judicial resolution—the concern that speech might be inhibited during the period between the expiration of a temporary administrative restraint and the rendering of the judicial determination that is necessary for the censor's decision to become final—has no bearing on schemes for the licensing of adult businesses, where a judicial decision is not a prerequisite for a license denial to become effective. It therefore is implicit in the analysis of the lead opinion in *FW/PBS* that licensing schemes for adult businesses need not impose rigid deadlines on the judicial review process.

B. First Amendment Principles Establish That Prompt Resolution Of Judicial Challenges To License Denials Is Not Necessary

As the preceding discussion suggests, more fundamental First Amendment principles, many of which were discussed by Justice O'Connor's opinion in *FW/PBS*, also indicate that a licensing scheme for sexually oriented businesses need not guarantee a prompt judicial decision when license denials are challenged. The decisions in which the Court has applied a requirement of expedited judicial review involved regulations of speech that were "presumptively invalid." *FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.). These included, most prominently, cases presenting censorship schemes in which state officials passed judgment on the *content* of speech, as in *Freedman* itself. See, *e.g.*, *Freedman*, 380 U.S. at 52, 54-55; *Southeastern Promotions*, 420 U.S. at 552-553; *Bantam Books*, 372 U.S. at 66. Such restrictions present particular dangers because they permit the suppression of speech by officials who may disapprove of the ideas expressed or the means of expression; because even well-intentioned censors

may be led into error by the fact that fully protected speech often is separated from expression that is legitimately subject to regulation (such as obscenity) "only by a dim and uncertain line" (*Bantam Books*, 372 U.S. at 66); and "[b]ecause the censor's business is to censor," meaning that state officials with responsibility for censorship may be insensitive "to the constitutionally protected interest in free expression." *Freedman*, 380 U.S. at 57-58. See *Thomas*, 534 U.S. at 321.

In addition, the Court has suggested that a prompt judicial determination may be necessary when issuance of a permit or license is "'contingent upon the uncontrolled will of an official.'" *Shuttlesworth*, 394 U.S. at 151 (citation omitted). See *Thomas*, 534 U.S. at 323; *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 133 (1992); *Southeastern Promotions*, 420 U.S. at 553. In such cases, as in the ones involving the censorship of content, "the prior restraint [i]s embedded in the licensing system itself, *operating without acceptable standards*." *Ibid.* (emphasis added). Thus, "none of these pre-*FW/PBS* cases involved a licensing ordinance for adult entertainment. Instead, they involved censorship." *Boss Capital*, 187 F.3d at 1256.

Ordinances like the one at issue here are quite different from the *Freedman* paradigm in a variety of material respects. *First*, as Justice O'Connor noted in *FW/PBS*, licensing schemes for adult businesses do not involve an assessment of the content of regulated speech, and therefore do not allow for the suppression of particular ideas. "Under [such an] ordinance, the City does not exercise discretion by passing judgment on the content of any protected speech. Rather, the City reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.). See *Boss Capital*, 187 F.3d at 1256 ("The dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the content

of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license."). Officials in Littleton thus base their licensing decisions on objective factors such as the regulatory and criminal history of the owner, instead of on the substance of the applicant's expression. See Littleton City Code § 3-14-8(A).

Second, such licensing systems give local officials very limited discretion. Administrators are not permitted "'to roam essentially at will'" (*Shuttlesworth*, 394 U.S. at 153 (citation omitted)), or to exercise a judgment that has a large subjective component. Instead, municipal decisionmakers are directed to judge compliance only with a defined set of neutral and objective factors.

Third, as Justice O'Connor also explained in *FW/PBS*, the practical impact of a licensing regime for adult businesses differs significantly from that of the censorship system at issue in *Freedman*. The expense and delay inherent in challenging the suppression of a *single* movie or book in a given locality means that exhibitors or publishers may find it "too burdensome to seek review of the censor's determination." *Freedman*, 380 U.S. at 59. In contrast,

> [t]he license applicant under the [Littleton] scheme ha[s] much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court.

FW/PBS, 493 U.S. at 229 (opinion of O'Connor, J.) Because such an applicant is likely to "stick it out and see litigation through to its end," "[t]he need for a prompt judicial decision is * * * less compelling for licensing ordinances than for censorship schemes." *Boss Capital*, 187 F.3d at 1256. At the same time, it may be that the speaker's powerful (and almost purely) commercial interest in providing the materials that are

available at a sexually oriented business, like the similar incentives underlying commercial speech, means that such expression is hardy enough to survive even if it is accorded diminished constitutional protection.

That observation is especially true of respondent in the circumstances of this case. As we have noted (at pp. 5-6, *supra*), the City has allowed respondent to continue operating its business during the course of the judicial proceedings concerning its entitlement to a license. And the "typical concern" of a business that is operating "is not the speed of court proceedings, but the availability of a stay of adverse action during the pendency of judicial review, however long that review takes." *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 285-286 (2001).

Against this background, First Amendment principles do not require the significant intrusion into state judicial processes that would follow from conditioning the constitutionality of licensing schemes for adult businesses on the guarantee of a prompt judicial decision when license denials are challenged. Because these licensing regimes are "not presumptively invalid" (*FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.)), there is no logical reason to insist that the judgment of the officials administering them be validated by an almost immediate judicial decision.

The practical concern with the difficulty of challenging the censorship of *particular* films that underlay the promptness requirement in *Freedman* is not present here. And the assurance in this case that licensees may obtain access to the courts *prior* to the effectuation of a license cancellation (see Colo. R. Civ. P. 106(a)(4)(V)) means that temporary restraining orders or preliminary injunctions are available to prevent clear cases of abuse on the part of local officials. See *Nightclubs, Inc.*, 202 F.3d at 897 (Meritt, J., dissenting); *Grand Brittain*, 27 F.3d at 1070, 1071. This case therefore calls "for 'treating unlike things differently according to their

differences'" (*Boss Capital*, 187 F.3d at 1256-1257 (citation omitted))—and thus for a departure from *Freedman*'s requirement of a prompt judicial decision.

C. Ordinances Requiring The Licensing Of Sexually Oriented Businesses Should Not Be Treated As Prior Restraints

The considerations discussed above are enough to invalidate the Tenth Circuit's reasoning. But there also is a more fundamental defect in the argument that the *Freedman* requirement of a prompt judicial decision applies here: in our view, challenges to licensing schemes for sexually oriented businesses do not call for the use of prior restraint analysis *at all*.

The Court has treated the state regulation of speech as a prior restraint in cases where officials controlled expression on the basis of its content or had virtually unconstrained discretion to deny speakers a license or permit—situations where the regulation of speech had "the potential for becoming a means of suppressing a particular point of view." *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 649 (1981). In contrast, the Court subjects limits on speech to the lower level of scrutiny suitable for time, place, and manner restrictions when the State has not

> adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. * * * Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.

Ward v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). See, *e.g.*, *Heffron*, 452 U.S. at 649.

It is this latter analysis, suitable for content-neutral regulations, that should govern licensing requirements for sexually oriented businesses. Such regulations plainly serve purposes that are "unrelated to the content of expression" and, because they are directed entirely at nonexpressive conduct (by, for example, limiting ownership of adult businesses by persons with a history of specified regulatory or criminal violations), are "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791. As Justice White and Chief Justice Rehnquist noted in their *FW/PBS* dissent, an ordinance like the one in Littleton "does not regulate content and thus it is unlike the content-based prior restraints that the Court has typically scrutinized very closely. * * * [T]here is no basis for invoking *Freedman* procedures to protect against arbitrary use of the discretion conferred by [such an] ordinance." *FW/PBS*, 493 U.S. at 246 (White, J., dissenting).

Indeed, each of the characteristics that recently led the Court to hold the licensing scheme at issue in *Thomas* to be a time, place, and manner regulation also is present here. Like the regulation in *Thomas*—which required the organizers of "large-scale events" in city parks to obtain a permit (534 U.S. at 317-318)—the Littleton ordinance "does not authorize a licensor to pass judgment on the content of speech: None of the grounds for denying a permit has anything to do with what a speaker might say." *Id.* at 322. As in *Thomas*, the Littleton regulation "(unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to *all* activity conducted in [an adult business]," a large portion of which is wholly unrelated to expression. *Ibid.*[12] "And the object of the [Littleton] permit system (as plainly indicated by the permissible grounds for permit denial) is not

[12] This would be true, for example, of activity at a regulated "adult motel," "sexual encounter establishment," or "nude model studio." See Littleton City Code § 3-14-2.

to exclude communication of a particular content * * *." *Ibid.* Accordingly, as in *Thomas*, in this case "*Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation." *Ibid.*

To be sure, the content of speech is relevant to the Littleton ordinance in one sense: the licensing scheme applies only to "adult business[es]" (Littleton City Code § 3-14-3(A)), and such an establishment is identified by whether, among other things wholly unrelated to speech, it exhibits and sells films, books, or periodicals that display any of a predictable list of defined sexual acts or portions of the anatomy. See *id.*, § 3-14-2. In closely related contexts, however, the Court has made clear that such ordinances must be treated as content neutral because they are "aimed not at the content of the films shown at [the adult business], but rather at the secondary effects of such [businesses] on the surrounding community" (*Renton*, 475 U.S. at 47) – and that is so even if disapproval of the business was a subsidiary motivating factor in the enactment of the ordinance. *Ibid.* As the Court has explained, such an "ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Id.* at 48.[13] See also *Alameda Books*, 535

[13] It is the stated purpose of the Littleton regulation "to prevent the deleterious location and concentration of adult businesses within the City, thereby reducing or eliminating the adverse secondary effects from such adult businesses." Littleton City Code § 3-14-1. The City Council adopted the regulation only after holding hearings at which it reviewed evidence "that documented the adverse secondary impacts that adult entertainment establishments have on adjacent and nearby properties" and "heard testimony regarding the deleterious effects that adult entertainment businesses have on surrounding businesses, property values, and crime rates." Pet. App. 41-42.

U.S. at 434, 438-440 (plurality opinion). This type of ordinance is "properly analyzed as a form of time, place, and manner regulation" (*Renton*, 475 U.S. at 48) because it "does not contravene the fundamental principle that underlies [the Court's] concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored and more controversial views.'" *Id.* at 48-49 (citation omitted). See *Pap's A.M.*, 529 U.S. at 292-293 (plurality opinion).

As Justice White noted in *FW/PBS*, this conclusion applies with full force to the licensing of sexually oriented businesses: decisions like *Renton* "make clear * * * that such regulation, although focusing on a limited class of businesses involved in expressive activity, is to be treated as content neutral." *FW/PBS*, 493 U.S. at 247 (White, J., dissenting). And under the analysis applicable to content-neutral regulations, ordinances like the one in Littleton must be upheld. Licensing decisions under the Littleton ordinance do not turn on the content of the applicant's speech, and the ordinance does not in any way attempt to limit the permissible forms of expression at adult businesses. On its face, the ordinance is instead directed at "prevent[ing] the deleterious location and concentration of adult businesses within the City, thereby reducing or eliminating the adverse secondary effects from such adult businesses." Littleton City Code § 3-14-1. There can be no doubt that this interest in "seek[ing] to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood" (*Pap's A.M.*, 529 U.S. at 293 (plurality opinion)) is a legitimate and important one "'that must be accorded high respect.'" *Renton*, 475 U.S. at 50 (citation omitted). And there has been no suggestion that the ordinance is overbroad, or that its stated purposes are pretextual. See generally *Heffron*, 452 U.S. at 647-655. Settled doctrine therefore establishes the validity of the

ordinance without regard to whether it provides for expedited judicial review—or any of the other accouterments of prior restraint analysis.

We say this with some hesitation, because we recognize that six Justices in *FW/PBS*, writing in two separate opinions, treated the Dallas ordinance there at issue as a species of prior restraint. See 493 U.S. at 225-230 (opinion of O'Connor, J.); *id.* at 238-241 (Brennan, J., concurring in the judgment). See also *Thomas*, 534 U.S. at 322 n.2 (noting that *FW/PBS* "applied two of the *Freedman* requirements"). In our view, however, the issue is one that the Court could appropriately consider anew. Justice O'Connor's lead opinion in *FW/PBS* did not reach the question whether the ordinance was properly viewed "as a content-neutral time, place, and manner restriction" because the opinion concluded that "the city's licensing scheme lacks adequate procedural safeguards." 493 U.S. at 223 (opinion of O'Connor, J.). But the opinion never expressly addressed the threshold question whether there was a proper basis for applying the procedural safeguards designed for prior restraints, and did not respond to the dissenting views of Justice White on this point. Because there is no majority opinion in *FW/PBS*, because the lead opinion did not directly analyze whether the licensing of adult businesses is properly treated as a prior restraint, because the assumption that underlies the outcome in *FW/PBS* is in tension with decisions such as *Renton*, and because treating such licensing systems as prior restraints is not easily squared with the Court's recent holding in *Thomas*, it would be appropriate for the Court to revisit the issue.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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